



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 5, 2005

Mr. Wm. Hulse Wagner  
McLeod, Alexander, Powel & Apffel  
P.O. Box 629  
Galveston, Texas 77553

OR2005-02894

Dear Mr. Wagner:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 221332.

The Port of Galveston (the "port"), which you represent, received a request for a copy of "term sheets" provided to the port by Gulf Copper & Manufacturing Corporation ("Gulf Copper") and Oceanus, LLC ("Oceanus"). You claim that the requested information may be excepted from disclosure under sections 552.101, 552.104, 552.110 and 552.131 of the Government Code, but make no arguments as to whether the information is so excepted from disclosure. Further, you indicate that the request may implicate third-party privacy or proprietary interests. Accordingly, you provide documentation showing that you notified these two third parties of the request pursuant to section 552.305 of the Government Code and of each party's right to submit arguments explaining why the information concerning it should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). You further state that, subsequent to the port's notification, Oceanus advised the port that it does not contest the release of the requested information pertaining to it, and that the port has, therefore, released the responsive information pertaining to Oceanus to the requestor. We have received and considered comments from Gulf Copper and reviewed the submitted information.

Gulf Copper claims that its information is excepted under section 552.104 of the Government Code. However, section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to the governmental body's interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). The port has not argued that the release of submitted information would harm its interests in a particular competitive situation. Therefore, no portion of Gulf Copper's information may be withheld pursuant to section 552.104 of the Government Code.

Gulf Copper also claims that its information is excepted under section 552.105 of the Government Code. We note, however, that section 552.105 only protects the interests of governmental bodies, not those of private parties such as Gulf Copper. *See* Open Records Decision Nos. 564 at 2 (1990) (governmental body may waive statutory predecessor to section 552.105), 522 (1989) (discretionary exceptions in general). Because the port has not raised this exception, none of Gulf Copper's information may be withheld on this basis.

Gulf Copper also indicates that section 552.110(b) of the Government Code is applicable to its information, as the information consists of commercial or financial information. Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999).

Upon review of Gulf Copper's arguments, we find that it has not made the specific factual or evidentiary showing required under section 552.110(b) that the release of its information would likely result in substantial competitive harm to the company. Accordingly, the port may not withhold any of the information related to Gulf Copper pursuant to section 552.110(b) of the Government Code.

Finally, Gulf Copper claims that section 552.131 of the Government Code is applicable to its information. Section 552.131 relates to economic development information and provides in part:

- (a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b). Because Gulf Copper has not made the specific factual or evidentiary showing required under section 552.110(b) that the release of any of its information would result in substantial competitive harm, we also conclude that the port may not withhold any of the information pursuant to section 552.131(a). Furthermore, we note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. Accordingly, none of the submitted information is excepted under section 552.131(b) of the Government Code. As neither the port nor Gulf Copper make any other arguments against disclosure, the port must release the submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the

statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/jev

Ref: ID# 221332

Enc. Submitted documents

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